EXECUTIVE BRANCH STRATEGY REGARDING
WTO DISPUTE SETTLEMENT PANELS AND THE APPELLATE BODY

REPORT TO THE CONGRESS TRANSMITTED BY
THE SECRETARY OF COMMERCE

December 30, 2002

I. INTRODUCTION

Section 2105 of the Trade Act of 2002 (the Act) provides that "the Secretary of Commerce, in consultation with the Secretary of State, the Secretary of the Treasury, the Attorney General, and the United States Trade Representative, shall transmit to the Congress a report setting forth the strategy of the executive branch to address concerns of the Congress regarding whether dispute settlement panels and the Appellate Body of the [World Trade Organization (WTO)] have added to obligations, or diminished rights, of the United States, as described in section 2101(b)(3)" of the Act. Those concerns are regarding "the recent pattern of decisions by panels of the WTO and the Appellate Body to impose obligations and restrictions on the use of antidumping, countervailing, and safeguard measures by WTO members under the Antidumping Agreement, the Agreement on Subsidies and Countervailing Measures, and the Agreement on Safeguards . . . " and that "panels of the WTO and the Appellate Body appropriately apply the standard of review contained in Article 17.6 of the Antidumping Agreement . . ."

A rules-based system under the WTO governing international trade is in the national interest of the United States. Because it is necessary to resolve the differences that inevitably arise between parties to such a system, an effective dispute settlement mechanism is an essential component of the WTO regime. The establishment of the WTO dispute settlement system is one of the most significant changes adopted as a part of the Uruguay Round of multilateral trade negotiations, a change sought by the Congress and achieved in the negotiations. The system has worked to the benefit of the United States, providing a means to enforce U.S. rights and contributing to greater compliance by WTO Members. The system has generally handled disputes expeditiously and with professionalism. At the same time, however, certain aspects of the dispute settlement system have raised concerns, including those identified by the Congress in connection with decisions involving U.S. trade remedies and safeguards. The Executive Branch is committed to addressing these concerns through the ongoing Dispute Settlement Understanding (DSU) and Rules negotiations, as well as through the current dispute settlement system.

II. URUGUAY ROUND NEGOTIATIONS

The system of dispute settlement at the WTO is an outgrowth of the Contracting Parties' experiences with the dispute-settlement mechanism under the General Agreement on Tariffs and Trade 1947 (GATT 1947). As the Contracting Party that used GATT dispute settlement more often than any other, as well as the major trading country accounting at the time for the largest percentage of imports and exports world-wide,[1] the United States had a strong interest in an effective process to enforce U.S. rights under multilateral trade agreements. Under the GATT 1947 mechanism, however, U.S. efforts to enforce its rights were often frustrated when other GATT parties delayed the dispute settlement process and blocked adoption of GATT panel reports.

Recognizing the ineffectiveness of the GATT 1947 mechanism, the Congress led the way in calling for a system of binding dispute settlement. Accordingly, in section 1101(b)(1) of the Omnibus Trade and Competitiveness Act of 1988,[2] the Congress stated that the negotiation of a dispute settlement system that provided for more effective and expeditious dispute resolution, and enabled better enforcement of U.S. rights, was a principal negotiating objective for the Uruguay Round of multilateral trade negotiations.

As explained in the Statement of Administrative Action (SAA) for the Uruguay Round Agreements Act (URAA),[3] the WTO Dispute Settlement Understanding achieved the objectives set out by the Congress by effecting important changes in the GATT 1947 dispute settlement process, including time limits for each stage of the dispute settlement process; appellate review; automatic adoption of panel or Appellate Body reports in the absence of a consensus to reject the report; and procedures to suspend trade concessions with any Member failing to implement Dispute Settlement Body (DSB) recommendations and rulings. The United States recognizes that an effective dispute settlement system advantages the United States not only through the ability to secure the benefits negotiated under the agreements, but also by encouraging the rule of law among nations.

The United States anticipated that the application of the DSU would greatly improve its ability to contest foreign trade remedy actions against U.S. exporters. At the same time, the United States recognized the importance of preserving its ability to take remedial action against unfair or injurious trade. Thus, the United States sought and obtained specific limitations on the role of panel and

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[1] When the Congress approved the Uruguay Round Agreements Act in 1994, the United States accounted for 12.2 percent of world exports and 16.1 percent of world imports.

[2] 19 U.S.C. 2901.

[3] *See* House Document 103-516, vol. 1, page 1008 (page 339 of the SAA).

Appellate Body reports in Articles 3.2 and 19 of the DSU and a special, deferential standard of review in Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Antidumping Agreement").

The Congress approved the results of the Uruguay Round negotiations, including the DSU, and the SAA in section 101 of the Uruguay Round Agreements Act of 1994. The Congress recognized that, as the leading trading nation in the world, the United States had much to gain from the WTO dispute settlement system and the Congress was very supportive of a binding system.

III. U.S. EXPERIENCE WITH WTO DISPUTE SETTLEMENT

Since the inception of the WTO in 1995, WTO Members have brought over 275 requests for dispute settlement consultations to the DSB. These disputes have ranged across the broad spectrum of subjects affecting trade covered by the WTO agreements, including agriculture, intellectual property, services, licensing, tariffs, subsidies, antidumping, safeguards, government procurement, taxes, and investment. Charts summarizing U.S. experience in these disputes, as a complainant and respondent, follow.

These charts are helpful in providing a quantitative overview of U.S. experience with dispute settlement. Their usefulness is limited, however, as each individual case addresses a wide range of issues of varying degrees of importance and effect, and the results are often mixed, with each side prevailing on some issue. Such charts cannot fully reflect the impact each case has had on U.S. rights and obligations under the WTO agreements. Consequently, a qualitative assessment of U.S. experience with the dispute settlement system also follows.

A. U.S. Experience As a Complainant.

The United States has filed 60 complaints with the DSB. Of these 60, 38 have been concluded; 2 were merged with other complaints; 3 are in the litigation stage (plus 1 compliance panel); and 17 are either in the pre-litigation consultation stage or currently inactive. A snapshot of these cases appears below.

SNAPSHOT OF WTO CASES INVOLVING THE UNITED STATES
UNITED STATES AS COMPLAINING PARTY

As of: 12/10/02

19-resolved to U.S. satisfaction without litigation:	(1) Korea-shelf-life restrictions; (2) EU-grain imports; (3) Japan-protection of sound recordings; (4) Portugal-patent protection; (5) Pakistan-patent protection; (6) Turkey-tax on movies; (7) Hungary-agricultural subsidies; (8) Philippines-pork & poultry imports; (9) Brazil-auto regime; (10) Sweden-intellectual property protection; (11) Australia-salmon imports; (12) Greece-intellectual property protection; (13) Ireland-intellectual property protection; (14) Denmark-intellectual property protection; (15) Romania-customs valuation; (16) Philippines-auto regime; (17) Belgium-rice imports; (18) Brazil-patent law; (19) EU-corn gluten imports
16-U.S. successful in its challenge of a measure:	(1) Japan-liquor taxes; (2) Canada-magazine imports; (3) EU-banana imports; (4) EU-hormone-treated beef imports; (5) India-patent protection; (6) Argentina-textile imports; (7) Indonesia-auto regime; (8) Korea-liquor taxes; (9) Japan-fruit imports; (10) Canada-dairy sector; (11) Australia-leather subsidies; (12) India-import licensing; (13) Mexico-antidumping duties on high-fructose corn syrup; (14) Canada-patent law; (15) Korea-beef imports; (16) India-auto regime
3-U.S. did not prevail in litigation:	(1) Japan-film imports; (2) EU/Ireland/UK-tariff classification of computer equipment *(three separate complaints consolidated into one case)*; (3) Korea-airport procurement
1-in appellate stage	(1) Canada-dairy sector (compliance panel);
3-in panel stage:	(1) Mexico-telecom barriers; (2) Japan-apples (fire blight); (3) EC-steel safeguards
5-in consultations:	(1) Argentina-patent protection; (2) EU-geographical indication protection; (3) Brazil-customs valuation; (4) Mexico-hog imports; (5) Venezuela - import licensing
12-monitoring progress or otherwise inactive:	(1) Korea-import clearance; (2) Japan-Large Stores Law; (3) Belgium-yellow pages; (4) EU-dairy subsidies; (5) Chile-liquor taxes; (6) Belgium-tax subsidies; (7) France-tax subsidies; (8) Greece-tax subsidies; (9) Ireland-tax subsidies; (10) Netherlands-tax subsidies; (11) EU/France-avionics subsidies; (12) Argentina-footwear imports

B. U.S. Experience As a Respondent.

Other Members have filed 70 complaints against the United States. Of these 70, 35 have been concluded; 10 were merged with other complaints; 8 are in the litigation stage; and 17 are either in the pre-litigation consultation stage or currently inactive. A summary of these matters is provided below.

SNAPSHOT OF WTO CASES INVOLVING THE UNITED STATES
UNITED STATES AS RESPONDING PARTY

As of: 12/10/02

12-resolved without litigation:	(1) Autos from Japan; (2) Wool coats from India; (3) Various products from EU; (4) Tomatoes from Mexico; (5) Poultry from EU; (6) Urea from Germany; (7) Brooms from Colombia; (8) Helms-Burton Act; (9) TVs from Korea; (10) Cattle, swine & grain from Canada; (11) Textiles from EU; (12) Massachusetts government procurement
3-U.S. prevailed in litigation:	(1) Sections 301-310 of Trade Act of 1974; (2) CVD regulations; (3) Section 129(c)(1) URAA
20-Aspect of U.S. measure found inconsistent:	(1) Gasoline from Venezuela & Brazil; (2) Underwear from Costa Rica; (3) Wool shirts from India; (4) "Shrimp/turtle" law; (5) DRAMs from Korea; (6) Leaded bars from UK; (7) Music licensing provision in US copyright law; (8) 1916 Revenue Act (*two complaints by EU & Japan consolidated into one appeal*); (9) Bonding requirements on EU goods; (10) Wheat gluten import safeguard; (11) Stainless steel from Korea; (12) Lamb meat import safeguard *(two complaints by Australia & New Zealand consolidated into one case)*; (13) Hot-rolled steel from Japan; (14) Cotton yarn from Pakistan; (15) Section 211 of Omnibus Appropriations Act; (16) Taxes on Foreign Sales Corporations; (17) Safeguard on line pipe from Korea; (18) AD-steel plate from India; (19) CVD-steel from Germany; (20) CVD-steel products from EU
1-in appellate stage:	(1) Byrd Amendment (*two cases consolidated into one proceeding*)
7-in panel stage:	(1) Safeguards on steel line pipe and wire rod from EU; (2) CVD-softwood lumber from Canada (prelim); (3) AD-sunset review (Japan); (4) Steel safeguards (*eight complaints by EC, Japan, Korea, China, Switzerland, Norway, New Zealand, Brazil consolidated into one case*); (5) Rules of origin-textiles and apparel products from India; (6) Orange juice from Brazil; (7) CVD-softwood lumber from Canada (final)
9-in consultations:	(1) CVD-steel from Brazil; (2) AD-steel pipe from Italy; (3) AD-silicon metal from Brazil; (4) AD-softwood lumber from Canada (prelim); (5) AD/CVD-sunset reviews (EC); (6) AD-softwood lumber from Canada (final); (7) Cotton subsidies (Brazil); (8) AD-sunset review (Argentina); (9) Steel safeguards (Chinese-Taipei)
8- monitoring	(1) Salmon from Chile; (2) Peanuts from Argentina; (3) Harbor maintenance

progress or otherwise inactive:	tax; (4) Live cattle from Canada; (5) Sugar syrups from Canada; (6) Section 337 of Tariff Act of 1930; (7) Amendment to Section 306 of Trade Act of 1974; (8) U.S. patent law

C. Assessment of U.S. Experience With WTO Dispute Settlement.

To date, the DSB has issued numerous reports regarding the disputes that have been referred to it. In general, the disputes that have been referred to the DSB have been handled expeditiously and with professionalism. The disputes have covered a broad range of WTO agreements and many complex and important issues under those agreements.

The United States has referred more matters to the DSB as a complaining party than any other country. Overall, the United States has generally fared well in WTO dispute settlement. The United States has used WTO dispute settlement to open markets for U.S. business; to preserve and create U.S. jobs; to eliminate trade distorting practices from the global marketplace; and to defend successfully U.S. laws and policies. These disputes include: *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather*; *Canada – Term of Patent Protection*; *Canada – Certain Measures Concerning Periodicals*; *European Communities – Regime for the Importation, Sale and Distribution of Bananas*; *India – Quantitative Restrictions on Imports of Agricultural, Textiles and Industrial Products*; *India – Measures Affecting the Automotive Sector*; *Indonesia – Certain Measures Affecting the Automobile Industry*; *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*; *Japan – Taxes on Alcoholic Beverages*; *Japan – Measures Affecting Agricultural Products*; *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*; *Korea – Taxes on Alcoholic Beverages*; *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*; and *United States - Section 129(c)(1) of the Uruguay Round Agreements Act; United States - Sections 301-310 of the Trade Act of 1974; Article 21.5 Panel on United States - Import prohibition of Certain Shrimp and Shrimp Products; United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*.

In these cases, WTO dispute settlement has benefitted a wide range of U.S. industries and their workers. Beneficiaries have included manufacturers and exporters of autos and auto parts; agricultural

producers, processors, and exporters; and intellectual property rights holders. This tally does not include numerous cases resolved to the satisfaction of the United States at the consultation stage, nor could it include the deterrent effect that the availability of an effective dispute settlement mechanism has on other countries contemplating measures that would be inconsistent with the WTO. Further, in many of the cases listed above as adverse decisions, the findings involved technical or procedural elements of a law or regulation, or its application, and the United States was easily able to implement the DSB recommendations without affecting the underlying law or regulation.[4]

Nevertheless, the United States does not agree with the approach that WTO panels and the Appellate Body have sometimes taken in disputes, and is concerned about the potential systemic implications. In particular, the executive branch views with concern the manner in which WTO panels and the Appellate Body have applied the applicable standard of review in disputes involving U.S. trade remedy and safeguards matters, and instances in which they have found obligations and restrictions on WTO Members concerning trade remedies and safeguards that are not supported by the texts of the WTO agreements.

When the WTO Members created the WTO and entered into the WTO agreements, they agreed to certain limitations on their actions and certain obligations *vis-à-vis* other Members. In so doing, the Members struck a very careful balance of commitments that provided them with certain benefits and costs. These benefits and costs formed the foundation upon which Members ratified the agreements and sustained Members' support for the agreements over the years.

If the perception develops that WTO panels and the Appellate Body are substituting their own policy judgment for a negotiated balance of rights and obligations, then it will be difficult to maintain the support and confidence of Members and the public in the value of future negotiations. It is essential, therefore, that WTO dispute settlement not alter the negotiated balance by creating limitations or obligations to which Members did not agree.

The texts of the WTO agreements explicitly recognize the crucial principle that the balance of commitments in the WTO agreements is to be preserved, and not altered by, WTO dispute settlement. Thus, the DSU and other WTO Agreements incorporate provisions that speak to the appropriate role of WTO panels and the Appellate Body and that provide the standards under which disputes are to be reviewed:

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[4] The GAO concluded in a 2000 study that in the cases in which the United States was the defendant and did not prevail, "the trade policy and commercial consequences of nearly all the challenges so far have been limited." U.S. General Accounting Office, "World Trade Organization; Issues in Dispute Settlement," Report to the Chairman, Committee on Ways and Means, at 8 (August 2000). Another GAO study on WTO dispute settlement, including several recent cases where the United States did not prevail, is expected in 2003.

- Article 3.2 of the DSU states: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

- Article 19.2 of the DSU states: "In accordance with [Article 3.2 of the DSU], in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."

- Article 17.6 of the Antidumping Agreement states: (i) "[I]n its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluations of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned; and (ii) [T]he panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

These provisions make plain that the WTO dispute settlement system should not operate so as to impose upon Members obligations to which they did not agree. Towards this end, panels and the Appellate Body must ground their analyses firmly in the agreement text and accept reasonable, permissible interpretations of the WTO agreements by the Members. Although these fundamental tenets of the dispute settlement system are clear, aspects of several recent reports by WTO panels and the Appellate Body have departed from them.

For example, in *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* (*Lamb Meat*), the Appellate Body found that an investigating authority must include in its report a demonstration of the existence of "unforeseen developments," despite the absence of any such requirement in the GATT 1994 and the Safeguards Agreement.

In *Lamb Meat, United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* (*Wheat Gluten*), and *United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* ("*Line Pipe*"), the Appellate Body imposed severe limitations on the International Trade Commission's causation analysis. Relying on a negative obligation not to attribute injury from other causes to imports, the Appellate Body fashioned an affirmative requirement to analyze not only the nature but also "the extent" of other causes. In making this finding, the Appellate Body relied in part on the conclusion that safeguards measures are "extraordinary," a term that appears neither in the relevant provision of the GATT 1994 nor in the Safeguards Agreement.

In *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* (*Japan Hot-Rolled*), the Appellate Body imported into the Antidumping Agreement the affirmative obligation it developed in the safeguard cases to analyze the extent to which each factor contributed to injury. Relying on the Antidumping Agreement's negative obligation not to attribute injury caused by other factors to the dumped imports, the Appellate Body fashioned an affirmative requirement to "separate and distinguish" the effect of the dumped imports from that of other factors. In doing so, the Appellate Body acknowledged, but declined to consider, the detailed language in the Antidumping Agreement governing how to conduct a causation analysis. In addition, the Appellate Body signaled that the special standard of review to which the Members agreed explicitly for antidumping cases in the Uruguay Round negotiations has very limited application. The Appellate Body concluded that most issues of law under the Antidumping Agreement can be resolved definitively by applying customary rules of interpretation of international law, limiting the occasions in which Members may adopt differing, but reasonable interpretations of unclear provisions.

Also in the *Japan Hot-Rolled* case, the Appellate Body found that dumping margins were "established under the circumstances of" the facts available rule (and, therefore, could not be used to calculate the weight-averaged "all-other" companies rate) if such margins contained even a single data point determined on the basis of the facts available. There were other interpretations of "established under the circumstances of" – falling short of containing *any* facts available – that would have been reasonable interpretations of that provision of the Antidumping Agreement. The Appellate Body nevertheless found that the only permissible interpretation of the Agreement was that a dumping margin was established on the basis of the facts available if it contained even a scintilla of facts available (and even if those facts were not adverse to the respondent). The Appellate Body reached this conclusion despite acknowledging that its interpretation would make "all-others" rates very difficult or impossible to determine.

The panel in *United States – Measures Treating Exports Restraints as Subsidies (Export Restraints)* addressed an issue that was not properly before it. That panel considered a provision of the U.S. countervailing duty law that tracks the relevant provision of the WTO Subsidies Agreement almost

verbatim. Canada nevertheless argued that this provision of law effectively required the Department of Commerce to treat export restraints as countervailable subsidies and was, therefore, inconsistent with the Subsidies Agreement. The panel correctly concluded that the U.S. statute was not inconsistent with the Agreement because it did not require any specific action with respect to export restraints. Despite acknowledging that it had no export restraint before it to review, the panel nevertheless opined on the status of export restraints under the SCM Agreement, concluding that such restraints, at least in the circumstances defined by Canada, could constitute actionable subsidies. Accordingly, the panel in effect offered an advisory opinion.

The United States has opposed troubling findings, including those described above, at the WTO Dispute Settlement Body (DSB) meetings at which panel and Appellate Body reports have been adopted, and has, in some instances, succeeded in reversing these findings in subsequent proceedings. For example, in *United States - Section 129(c)(1) of the Uruguay Round Agreements Act (Section 129*), Canada made another attempt to obtain an advisory opinion. The United States undertook an extended critique of the panel's approach in *Exports Restraints*, and the panel accepted that analysis, concluding that it would be inappropriate for the panel to offer what would amount to an advisory opinion.

In addition, in the recent case *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products From Germany* (*German Steel*), the panel read an obligation into the Subsidies Agreement that was not there. Specifically, the panel concluded, without a textual basis, that the *de minimis* standard applicable in original investigations was also applicable in sunset reviews. Fortunately, in a solid analysis, the Appellate Body reversed the panel and found that no such *de minimis* standard applied to sunset reviews.

The foregoing discussion does not constitute an exhaustive list or a complete analysis of the relevant cases; nor is it intended to suggest that, even with respect to the cases discussed, all of the panel and Appellate Body findings were based on a problematic analytical approach, or that the panel or Appellate Body would have necessarily found in favor of the United States had the proper analytical approach been used. Nevertheless, while problematic findings are a minority of those issued in dispute proceedings in which the United States has been involved, they are still troubling in their lack of grounding in the negotiated agreement texts and, with respect to antidumping disputes, their failure to recognize that agreement terms may be susceptible of multiple, reasonable interpretations among which Members may properly choose.

IV. EXECUTIVE BRANCH STRATEGY

The strategy of the Executive Branch to address the concerns described above, and identified by the Congress in Section 2101(b)(3) of the Act, is twofold. First, the Executive Branch intends to

address these concerns in both the DSU and Rules negotiations. Second, pending the outcome of those negotiations, it intends to work within the current dispute settlement system to avoid panel or Appellate Body findings that would be of concern. Through this strategy, the United States seeks to improve several aspects of the DSU while maintaining the strength and effectiveness of trade remedies. In implementing this strategy, the Executive Branch will also be fulfilling the trade negotiating objectives set forth in Section 2102 of the Act[5] and responding to the public comments received regarding institutional improvements to the WTO and the subjects covered in the Doha Declaration.[6]

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[5] The Congress has stated that an overall trade objective is "to further strengthen the system of international trading disciplines and procedures, including dispute settlement." As principal trade negotiating objectives for transparency, the Congress has indicated that negotiators should "obtain wider and broader application of the principle of transparency through (A) increased and more timely public access to information regarding trade issues and the activities of international trade institutions; (B) increased openness at the WTO and other international trade fora by increasing public access to appropriate meetings, proceedings, and submissions, including with regard to dispute settlement and investment; and (C) increased and more timely public access to all notifications and supporting documentation submitted by parties to the WTO." Furthermore, the Congress has stated that as principal negotiating objectives for dispute settlement and enforcement, negotiators should "seek adherence by panels convened under the Dispute Settlement Understanding and by the Appellate Body to the standard of review applicable under the Uruguay Round Agreement involved in the dispute, including greater deference, where appropriate, to the fact-finding and technical expertise of national investigating authorities" and "seek provisions encouraging the early identification and settlement of disputes through consultation." With regard to trade remedy laws, the principal negotiating objectives stated by the Congress include preserving "the ability of the United States to enforce rigorously its trade laws . . ." and avoiding "agreements that lessen the effectiveness of domestic and international disciplines on unfair trade . . ."

[6] In response to *Federal Register* notices published by the Office of the U.S. Trade Representative (USTR), 65 Fed. Reg. 36501 (June 8, 2000) and 67 Fed. Reg. 12637 (March 19, 2002), interested persons filed comments regarding institutional improvements to the WTO and the subjects covered in the Doha Declaration. USTR received comments from numerous companies, trade associations, public interest groups and other non-governmental organizations and shared these comments with the Trade Policy Staff Committee (TPSC). In general, these comments suggested a number of areas where the United States could focus its efforts in the DSU and Rules negotiations, including transparency, standard of review, the mandate of WTO panels and the Appellate Body, the expeditiousness and sequencing of dispute settlement procedures, effectiveness of compliance procedures, and the preservation of trade remedy laws.

Those who commented on transparency urged that the United States seek greater transparency at the WTO, including more timely access to DSB documents, expanded access to DSB proceedings, and public participation in DSB proceedings. Comments seeking action on the standard of review and mandate issues stated that WTO panels and the Appellate Body have not properly applied the standards of review in trade remedy cases, resulting in DSB recommendations and rulings that lack a textual basis in the WTO agreements and impermissibly add to the obligations or diminish the rights negotiated in the WTO agreements. With regard to dispute settlement procedures, the comments expressed support for streamlining the dispute settlement and implementation processes and ensuring greater compliance with WTO rulings. Most of the comments on the Rules negotiations stated that the United States should seek improvements in the dispute settlement system while maintaining strong and effective trade remedy laws and without undermining or weakening the Antidumping Agreement or the Agreement on Subsidies and Countervailing Measures.

A. DSU Negotiations.

In the Uruguay Round, Members mandated that there be a review of the DSU within five years. Members recognized at the conclusion of the Uruguay Round that after a period of time there would be a need for refinements and improvements to the DSU based on Members' experiences and the performance of the DSB. Consistent with this recognition, the Doha Declaration renewed the mandate for Members to negotiate improvements and clarifications of the dispute settlement system. The DSU negotiations offer Members the opportunity to assess the strengths and weaknesses of the WTO dispute settlement system and to work together to improve the system.

Since the Doha Declaration was issued, the United States has taken an active role in the DSU negotiations to this end. The United States has tabled proposals that would provide greater flexibility and Member control in the dispute settlement process, including the ability to more effectively address errant or unhelpful panel reasoning. Moreover, the United States has tabled proposals regarding transparency, and has been exploring proposals, advanced by various Members, regarding WTO dispute settlement procedures and implementation.[7]

1. Greater Member Control Over the Dispute Settlement Process.

In consultation with the Congress and other interested persons, the United States has tabled proposals with other delegations on ways to help avoid erroneous or unnecessary findings. As noted above, while the WTO dispute settlement panels and the Appellate Body have in general performed well the responsibilities entrusted to them, there have been occasions when their findings have not reflected the negotiated text of the relevant WTO agreement or have not been necessary to resolve the dispute. These erroneous findings may have resulted from a misunderstanding of the task assigned, the facts or law involved, or of the findings sought by the parties. Some of them, however, have involved situations where the relevant WTO text does not address an issue, and the adjudicative body has "filled the gap," thereby adding to the obligations under the relevant agreement, instead of clarifying those rights and obligations.

The U.S. concerns go to the heart of the dispute settlement system and apply irrespective of whether a particular outcome favors the United States; therefore, these concerns present systemic issues that should be shared by WTO Members as a whole. Other Members have also expressed their view, based on their own experiences, that some panel and Appellate Body findings have been erroneous. The United States is interested in advancing proposals that will help avoid such erroneous or unnecessary findings in the future. Towards this end, the United States, joined by Chile, has recently submitted a proposal setting forth systemic approaches for improving the dispute settlement process by

[7] Copies of the U.S. proposals are provided in an appendix to this report.

providing Members (1) greater control over the dispute settlement process and (2) greater flexibility to settle disputes. The key elements of this proposal are:

- Parties currently have a right to see and to comment on a draft of the panel report before the panel finalizes it, but there is no such corresponding right at the appeal stage. The proposal would give parties this right at the appeal stage, thereby helping to strengthen the final Appellate Body report.

- At present, dispute settlement reports are a "take it or leave it" proposition where WTO countries must accept or reject dispute settlement reports in their entirety, without modification. The proposal would allow countries to agree to delete findings in reports that hinder settlement or that are unnecessary or erroneous.

- Countries have a limited ability to suspend dispute settlement proceedings once they have begun. Panel proceedings can be suspended only if the panel accepts a request from a complaining party; appeal proceedings cannot be suspended at all. The proposal would let the parties, by agreement, suspend either panel or appeal proceedings. The additional time thus obtained can be important to facilitating an agreed solution.

- Experience to date shows that it can be helpful for the panelists to have the appropriate expertise concerning the particular issues in a dispute, although the current agreement does not speak to this issue. The proposal would help ensure that panelists have appropriate expertise.

- Some WTO Members have expressed concern that panels and the Appellate Body could benefit from additional guidance on the scope and nature of the tasks entrusted to them. The proposal calls for providing such guidance.

Providing Members with these types of tools can help avoid erroneous or unnecessary findings in all WTO disputes. It would also help to affirm the function of the dispute settlement system to assist in resolving disputes between Members.

The Executive Branch plans to explore these and other possible proposals as the negotiations move forward.

2. Transparency in the WTO Dispute Settlement System.

The United States believes that a dispute settlement system that is more open to the public and is better understood by the public will have greater public support. To this end, the United States has sought to make its participation in WTO dispute settlement as transparent as possible, through sharing its

submissions with the public, seeking public comment on WTO disputes, and supporting *amicus curiae* submissions. Moreover, the United States has submitted a proposal to improve transparency among all Members. This proposal seeks open meetings, timely access to submissions, timely access to final reports, and guideline procedures for handling *amicus curiae* submissions. This proposal is responsive not only to the transparency objective in Section 2102 of the Act and the public comments, but also to the concerns stated in Section 2101. Specifically, a more open and transparent process under the DSU will subject the operations of the dispute settlement system to greater public scrutiny. Such increased public access to the dispute settlement process will support greater accountability of the dispute settlement system. Access also is likely to make WTO panels and the Appellate Body even more aware of the importance of fulfilling their responsibilities to resolve disputes without imposing additional obligations not found in the text of the WTO agreements, as well as to apply correctly the standards of review in the DSU and the Antidumping Agreement.

3. Other Issues in WTO Dispute Settlement.

The United States and other Members recognize that the WTO dispute settlement system should function as efficiently and effectively as possible. In this regard, Members have tabled a broad range of proposals addressing the panel and Appellate Body process, including, for example, proposals concerning how panels are selected and their procedures; on the process concerning compliance with findings of a breach of WTO obligations and surveillance of compliance with those findings; and on compensation and the suspension of trade concessions in the event of a breach of WTO obligations. The United States is reviewing those proposals in light of the concerns expressed by the Congress in Section 2101(b)(3) of the Act, and will work with other delegations on appropriate responses to those proposals.

B. Rules Negotiations.

The Ministers also agreed to negotiations on WTO rules in paragraph 28 of the Doha Declaration. The negotiations include "clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles, and effectiveness of these Agreements and their instruments and objectives . . ."

The United States has been an active participant in these negotiations, pressing partners to focus on issues relating to the underlying trade-distorting practices that often lead to unfair trade, while ensuring that the integrity of the existing agreements is preserved. The mandate provides for a process of issue identification followed by negotiation. The negotiating group is continuing its work on issue identification, and will continue to do so in the coming year. With respect to the issues of concern, to date the United States has made contributions focused on the basic concepts and principles that should govern the

negotiations as well as a submission relating to improving investigatory procedures in antidumping and countervailing duty investigations.[8] These submissions are part of a series of submissions that the United States envisions in this area, and were the subject of extensive congressional consultations.

The United States has identified four core principles for these negotiations. First, following Ministers' guidance from Doha, the United States believes it is essential that these negotiations be designed to maintain the strength and effectiveness of the trade remedy laws, and to complement a fully effective dispute settlement system which enjoys the confidence of all Members. Second, trade remedy laws must operate in an open and transparent manner. Third, disciplines must be enhanced to address more effectively underlying trade-distorting practices. Fourth, it is essential that dispute settlement panels and the Appellate Body, in interpreting obligations related to trade remedy laws, follow the appropriate standard of review and do not impose on national authorities obligations that are not contained in the Agreements.

During the course of the negotiations, the United States will table and support proposals that are consistent with these principles. In particular, the United States will use the Rules negotiations to promote the proper application of the standards of review and the recognition that dispute settlement panels and the Appellate Body are not to impose obligations or restrictions that are not in the text of the WTO rules agreements. The Executive Branch will continue to consult with the Congress on these important negotiations.

C. Pending and Interim Disputes.

The concerns expressed by the Congress involve preventing findings by panels and the Appellate Body that would not be in accord with the current provisions of the WTO agreements. Accordingly, it is important to work in the context of pending disputes and any disputes prior to the implementation of the results of the DSU and Rules negotiations to ensure that the findings in those disputes do not give rise to the types of concerns expressed in Section 2101(b)(3) of the Act.

When such findings have occurred in past cases, the United States has criticized them at the WTO. For example, as described above, the United States strongly criticized the advisory opinion in *Export Restraints* at the DSB, and the subsequent panel in *Section 129* agreed with the United States in rejecting a similar request for an advisory opinion. Also as described above, the United States

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[8] A major goal in addressing these investigatory procedures is to ensure that U.S. exporters are treated fairly. U.S. exporters are a frequent target of foreign antidumping proceedings, with over 100 investigations initiated against them since 1995. Increasingly, antidumping proceedings involving U.S. exporters are being instituted without well-established standards of transparency and due process.

successfully appealed a panel finding in the *German Steel* dispute that would have improperly created a *de minimis* standard in sunset reviews. That dispute established a standard for future panels on the proper application of customary rules of agreement interpretation. In *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* (*EC Bed Linens*), the United States presented strong arguments as a third party for the proper application of customary rules of agreement interpretation, and the Article 21.5 compliance panel accepted them.

The United States will continue to work to communicate the United States' concerns clearly to panels and the Appellate Body and to prevent findings that would give rise to the types of concerns expressed in Section 2101(b)(3). The tools available for these purposes include submissions to panels and the Appellate Body, comments on the proposed findings of panels, and discussions of any findings at the DSB.

V. CONCLUSION

WTO dispute settlement affords a number of benefits to the United States, and the United States has achieved successes within the current rules. At the same time, the manner in which panels and the Appellate Body render findings in the area of antidumping, countervailing, and safeguard measures would especially benefit from clarification and improvement. The Executive Branch will continue to use the opportunities provided by the Doha agenda DSU negotiations and Rules negotiations to address the concerns raised, while continuing to work to prevent additional findings on these types of measures that would be of concern.